ment of industry. Joint control by the parties directly engaged in the industry, rather than government control, seems more in accord with our traditional principles of government. The government must always be ready, however, to step in and operate any essential industry, such as the railroads or coal mines, if there is a complete breakdown. This system does not guarantee economic justice, but it may serve to make the parties realize that it is to their economic interest to settle their problems by mutual concessions.

If the courts attempt to regulate our industrial situation by mere deduction from legislative formulae, they may reach a result so out of harmony with community needs as to invite a violent overthrow and a seizure of legislative and judicial power by those who may be least able to use it wisely even for their own material welfare.[14] Our judiciary cannot hope to escape criticism, whatever may be their action; but either they must consciously assume the role of social law-makers, or they must leave the field open to private war between classes.

C. D. P.

POWER OF CONGRESS TO REGULATE STATE PRIMARIES

Widespread interest and much adverse criticism has been attracted by the decision of the Supreme Court in *Newberry v. United States* (1921, U. S.) 41 Sup. Ct. 469, reversing the District Court which had convicted Newberry and others of conspiring to violate the Corrupt Practices Act.[1] While the Court was unanimous in holding that the judgment should be reversed, it divided upon the question of the constitutionality of the act as applied to nominating primaries and conventions, holding by a bare majority that Congress has no power to regulate the expenditures of candidates for the House of Representatives or for the Senate in seeking a party nomination, but only when seeking "election" in the narrower sense. The remaining members of the court, the Chief Justice and Justices Pitney, Brandeis, and Clarke, denied that there was any constitutional infirmity in the act underlying the indictment, but voted for reversal on the ground that the case was improperly presented to the jury by the court below.

The constitutional provision involved is article I, section 4, which is as follows:

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature

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U. S. 1, 26, 35 Sup. Ct. 240, 248, where he states that it is in the equality of position that liberty of contract begins.

[14] For a severe arraignment of the Massachusetts Court see (April 13, 1921) 26 THE NEW REPUBLIC, 171.

[1] Act of June 25, 1910 (36 Stat. at L. 822, 824) as amended by the Act of August 19, 1911 (37 Stat. at L. 25, 26).

thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

It is fairly obvious, as pointed out in the majority opinion by Mr. Justice McReynolds, that this alone is the source of Congressional power over the elections specified. If there were no such provision the states would have free and untrammeled discretion in the time, place, and manner of choosing their representatives to congress. The argument of Mr. Justice Pitney, in his dissenting opinion, concurred in by Justices Brandeis and Clarke, that under this decision the states themselves can have no reserved power to regulate primary elections, because "whatever the states do in this matter they do under authority derived from the Constitution of the United States," seems untenable. The clause in question confers upon Congress certain powers which otherwise would have been vested in the states by necessary implication, and there is nothing to prevent the application of the Tenth Amendment reserving to the states such powers as were not delegated; the decision is thus not inconsistent with the power of the states to regulate and control these primaries as they see fit.

Under this clause Congress has exercised the power of requiring that representatives be elected by districts,[2] of bringing about uniformity in the time of elections,[3] and of providing supervisors of elections and other means to see that they are legally and fairly conducted.[4] The extent of this Congressional power over the "manner of holding elections" had not been limited or defined by the Supreme Court and was not in issue in the principal case. The question involved, raised but not decided a few years previously,[5] was merely whether the word "elections" includes nominating primaries and conventions. While the present decision answering this question in the negative and holding that Congress has no power over nominating primaries and conventions, may involve some inconvenient consequences, especially in view of the fact that under our present system the nomination of a candidate is sometimes quite as important as the final election, it is difficult to disagree with the reasoning of the Court in its interpretation. Nominating primaries were unknown when the Constitution was adopted, and while this is not in itself conclusive, how can we say that if such a development had been contemplated the states adopting the Constitution would have chosen to give Congress the power to interfere in the conduct of the various unofficial agencies by which candidates are

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[2] See *Ex parte Yarbrough* (1883) 110 U. S. 651, 661, 4 Sup. Ct. 152, 157; *United States v. Gradwell* (1916) 243 U. S. 476, 482, 37 Sup. Ct. 407, 409.

[3] See *Ex parte Yarbrough, supra* note 2.

[4] *Ex parte Siebold* (1879) 100 U. S. 371; *Ex parte Clark* (1879) 100 U. S. 399; *In re Coy* (1887) 127 U. S. 731, 8 Sup. Ct. 1263.

[5] *United States v. Gradwell, supra* note 2.

selected? The Constitution has proved conveniently adaptable to changed conditions, but its framers were not so prescient as to have been able to construct every part, if they had so desired, of the same elasticity. Whatever disagreement there may be as to its merits, the decision is welcome as a sign that the tendency to brush aside constitutional obstacles for the sake of expediency, under the misused name of "liberal construction," has not yet swept away all opposition.

Can an unincorporated labor union maintain an action for slander of the union as a whole? The question is such a novel one that in the case of *Dock, Wharf, Riverside and General Laborer's Union v. White* (1921, N. P.) 65 SOL. JOUR. 723, Mr. Justice Darling reserved his decision on the point. If the labor union is to be considered as a class of persons instead of a legal entity, it is familiar law that the class as a whole cannot bring suit for slander.[1] And it is well settled that a common law suit cannot be maintained in the adopted trade name.[2]

In England it has been held that to sue and be sued are attributes of the ownership of property.[3] In Canada, also, it seems that the criterion is the property-holding character of the association.[4] But these decisions do not relieve the situation of a non-property-holding labor union suffering under the sting of a defamatory attack. In the United States, in the absence of statute, the common-law rule applies and the union cannot sue in its trade name.[5] And as it has been repeatedly decided that a labor union is not in "business," those statutes allowing suit by an unincorporated association "doing business" within that

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[1] 70 Am. St. Rep. 754, note.

[2] *St. Paul Typothetae v. St. Paul Bookbinder's Union* (1905) 94 Minn. 451, 102 N. W. 725.

[3] *Taff Vale Ry. v. Amalgamated Society of Ry. Servants* [1901, H. L.] A. C. 426, holding that the statutes (Trade Union Acts of 1871 & 1876, 39 & 40 Vict. c. 22, sec. 3) which invested the unions with certain corporate privileges, such as owning property and acting through agents, had thereby impliedly imposed the other legal attributes of a corporate entity. Subsequently the liability to be sued was expressly taken away by statute. Trade Disputes Act of 1906, 6 Edw. VII, c. 47, sec. 4. This statute, however, did not take away the privilege to sue. See *Vacher v. London Society of Compositors* [1913, H. L.] A. C. 107.

[4] *Metallic Roofing Co. v. Amalgamated Association* (1903) 5 Ont. L. Rep. 424, in which the Canadian view is stated as following that of the English courts.

The distinction between corporate and unincorporate bodies is now regarded as a legal technicality and frequently overlooked where the unincorporated association owns property. See Smith, *Law of Associations* (1914) 70.

[5] *Agricultural Extension Club v. Hirsch* (1919, Calif. App.) 179 Pac. 430; *Diamond Coal Co. v. United Mine Workers* (1920) 188 Ky. 477, 222 S. W. 1079; 24 Cyc. 829.

state, offer no relief.[6] However, more liberal statutes have been enacted in a few of the states allowing suit by such associations of five or more persons operating under a distinguishing name.[7]

Because of the peculiar nature of the modern labor union as a mutual protective, rather than a business association, and their almost universal practice of remaining unincorporated, it seems that legislation allowing suit is necessary in order to afford a remedy. Otherwise, in many jurisdictions the labor union is left without redress against even the most unjust and malicious attacks on its good name.

A parent has been held to have such a near-property interest in his children as to entitle him to equitable relief against evil-doers who would lead them astray.[1] No doubt many will take great satisfaction in the decision in *Fisher v. Star Co.* (1921) 231 N. Y. 414, 132 N. E. 133, holding that "Bud" Fisher has a like property interest in "Mutt" and "Jeff." The court fully realized that the plaintiff had himself endowed his popular offspring with "grotesque figures" and that their characters are "imaginary and fictitious." Even so, he is entitled to an injunction to prevent their further demoralization and the destruction of their financial value to him by "inferior imitation." Other cartoonists may perhaps be legally privileged to name their own creations after the more celebrated family of Mr. Fisher; but they must not imitate either names or faces in such fashion as to deceive an uncritical public into thinking that they are looking at the genuine Fisher tribe. The court holds that this would be unfair competition in cartoons, a breach of the plaintiff's rights *in rem,* rights wholly the creation of equity and in no way dependent upon the federal statutes as to copyrights and trademarks.

It is of some interest that the court quotes and relies upon the decision in the Associated Press case,[2] where the defendant was enjoined from printing news collected by another. In holding this to be unfair competition, Mr. Justice Holmes said: "The ordinary case is palming off the defendant's product as the plaintiff's, but the same evil may follow from the opposite falsehood—from saying, whether in words or by implication,[3] that the plaintiff's product is the defendant's."

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[6] *Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce* (1917) 34 Calif. App. 37, 166 Pac. 856; *Burnetta v. Marceline Coal Co.* (1904) 180 Mo. 241, 79 S. W. 136.

[7] N. Y. C. C. P. sec. 1919, allowing suit by unincorporated associations of seven or more persons to be brought in the name of the trustees; Mich. Comp. Laws, 1915, ch. 12363, sec. 12. See also Mass. Laws, 1921, ch. 368.

[1] *Stark v. Hamilton* (1919) 149 Ga. 227, 99 S. E. 861; (1920) 29 YALE LAW JOURNAL, 344.

[2] *International News Service v. Associated Press* (1918) 248 U. S. 215, 39 Sup. Ct. 68; COMMENTS (1919) 28 YALE LAW JOURNAL, 387.

[3] For a thorough treatment of the subject of Unfair Competition see Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE LAW JOURNAL, 1.